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June 21, 1988

JUL 25 1988

Michael Holmes, Esquire
Office of the Consumer Advocate
8 Old Suncook Road
Concord, NH 03301

Re: Compatibility of Legislative Office
With Classified State Employment

Dear Mr. Holmes:

You have requested our opinion as to the potential incompatibility of legislative office with classified state employment. Specifically, you have inquired whether a rate analyst for the Office of the Consumer Advocate may hold office simultaneously as a state legislator. As I informed you orally on May 31, 1988, we answer in the negative because it is our opinion that these positions are incompatible.¹

¹We note that, despite the advice provided, the employee in question nevertheless has declared his candidacy with the Secretary of State. The fact of his election would in and of itself constitute a resignation from the state classified service. See, e.g. Stolberg v. Caldwell, 402 A.2d 763 (Conn. 1978). We assume, of course, that he would not decline to serve in the event he were elected. See RSA 655:17 (persons declaring candidacy must affirm that they will not withdraw after nomination and that they will assume the duties of office if elected).



RSA 21-I:52 provides as follows:

No employee in the state classified service shall hold any remunerative elective public office, or have other employment, either of which conflicts with his employment . . .

The office of state legislator is remunerative because legislators receive \$200 per term as compensation for their services. New Hampshire Constitution, Part 2, Article 15. Accordingly, the crucial question here is whether the holding of a rate analyst position would conflict with the holding of state legislative office.

Under the common law, one of the critical factors in determining compatibility of offices is whether one office is subordinate to the other in some of its important and principle duties and subject in some degree to its revisory power. 1 New Hampshire Opinions of the Attorney General 102 (1965); See also Advisory Opinion to the Governor 394 A.2d 1355 (R.I. 1978); Reilly v. Ozzard, 166 A.2d 360 (N.J. 1960). Offices are in conflict if, because of natural contradictions between both, one person cannot faithfully, impartially and efficiently carry out the duties of both. State ex rel. Hover v. Wolven, 191 N.E. 2d 723 (Ohio 1963). Incompatibility exists also where there are potential conflicts between the offices because of the obligation to exercise independent judgment. Tarpo v. Bowman Public School District, 232 N.W. 2d 67 (N.D. 1975).

The position of rate analyst is established in RSA 363:28, which creates the Office of the Consumer Advocate. The Office is charged with representing the interests of a specific class of utility customers, namely residential ratepayers, before "any board, commission, agency, court or regulatory body." RSA 363:28, II. In particular, the rate analyst position has been used to provide expert testimony to various bodies, including the legislature itself.²

²It should be noted that utility ratemaking is a legislative function. Appeal of Pennichuck Water Works, 120 N.H. 562, 565-66 (1980). This function may be delegated to the Public Utilities Commission or performed by the legislature itself. Petition of Public Service Company of New Hampshire N.H. (January 26, 1988); Appeal of Public Service Company of New Hampshire, 125 N.H. 46, 57 (1984).

In comparison to the mandate for representation of narrow interests by the Consumer Advocate, the legislature is charged with the exercise of completely independent judgment. See Keefe v. Roberts, 116 N.H. 195, 198 (1976). As a consequence, a natural conflict would exist between the position of state legislator, called upon to exercise independent judgment, and that of Consumer Advocate staff member, committed to the representation of special interests. See N.H. Constitution, Part 2, Art. 7 ("No member of the general court shall take fees, be of counsel, or act as advocate, in any cause before either branch of the legislature; and upon due proof thereof, such member shall forfeit his seat in the legislature"); compare Reilly, supra, 166 A.2d at 360, 368 (the office of municipal attorney would be incompatible with that of legislator if the attorney were charged with the obligation of lobbying: "Quite obviously a legislator, whether or not a lawyer, could not lawfully be engaged [to introduce or oppose legislative proposals] by any interests, public or private.")

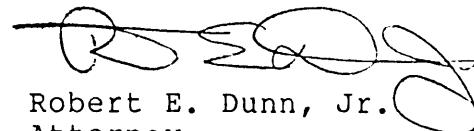
It is also significant that one of the fundamental responsibilities of any legislator is participation in the budget process. By virtue of that role, a legislator votes to allocate funds to certain agencies while limiting or withholding funds from other agencies. The independent judgment required for such responsibility clearly could not be exercised by a person employed by one of the agencies competing for those funds; at the very least, the appearance of impropriety would exist.

Moreover, the Consumer Advocate, as a creation of the legislature, is subject to the legislature's power to supervise or even to abolish. Although the employee as rate analyst is subordinate to the Consumer Advocate, the employee as legislator would have at least indirect authority over the Consumer Advocate. The employee thereby would become, in effect, a supervisor of his own supervisor.

Accordingly, a conflict would exist were a classified state employee in the Office of the Consumer Advocate to hold office as a state legislator.

I trust that this has been responsive to your inquiry.
Please do not hesitate to contact me if I can be of further
assistance.

Very truly yours,



Robert E. Dunn, Jr.
Attorney

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